Petition

81-2071

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARVIN LESLIE MATHIS

Petitioner

V

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER COUNT III OF THE INDICTMENT AGAINST THE PETITIONER ADEQUATELY AND SPECIFICALLY ADVISED HIM, THE COURT, AND THE JURY OF THE ACTUAL OFFENSE CHARGED.

2. WHETHER PETITIONER'S CONVICTION IN COUNT III SHOULD BE OVERTURNED EITHER BECAUSE HE WAS CONVICTED IN COUNT III OF THE SAME ACT OF WHICH HE WAS ACQUITTED IN COUNT I, OR BECAUSE HE WAS CONVICTED IN COUNT III OF A CRIME WITH WHICH HE WAS NOT CHARGED.

A. WHETHER PETITIONER'S CONVICTION IN COUNT III SHOULD BE OVERTURNED BECAUSE HE WAS CONVICTED IN COUNT III OF A CRIME WITH WHICH HE WAS NOT CHARGED.

B. WHETHER PETITIONER'S CONVICTION IN COUNT III SHOULD BE OVERTURNED BECAUSE HE WAS CONVICTED IN COUNT III OF THE SAME CRIME OF WHICH HE WAS ACQUITTED IN COUNT I.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

MARVIN LESLIE MATHIS

Petitioner,

V

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Marvin Leslie Mathis, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered in the above-entitled cause on February 8, 1982.

OPINIONS BELOW

The February 8, 1982 opinion of the Tenth Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is scheduled to be published and is reprinted in Appendix A hereto, infra, page 35. The February 13, 1981 judgment of the District Court of the District of New Mexico is unreported and is reprinted in Appendix B hereto, infra, page 67. The March 2, 1982 order of the Tenth Circuit Court of Appeals, denying a rehearing is reprinted in Appendix C hereto, infra, page 71.

JURISDICTION

The case to be reviewed is a criminal case in which Petitioner was convicted of a violation of 21 U.S.C. §§ 841(a)(1). The

judgment of the Tenth Circuit Court of Appeals was entered on February 8, 1982. A timely Petition for Rehearing was denied on March 2, 1982. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves the Fifth Amendment of the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

> criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Sixth Amendment of the Constitution of the United States which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case further involves Rule 7(c)(1) of the Federal Rules of Criminal Procedure, which provides, inter alia, as follows:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

STATEMENT OF THE CASE

Nature of the Proceedings

Marvin Leslie Mathis, Petitioner herein, was indicted on September 9, 1980, in Criminal No. 80-147, in the United States District Court for the District of New Mexico, in Albuquerque, New Mexico. Counts I and III charged Mathis with possession with intent to distribute cocaine, a schedule II narcotic drug controlled substance, in violation of 21 U.S.C. § 841(a)(1). Counts II and IV charged Mathis with distribution of a quantity of cocaine, a schedule II narcotic drug controlled substance, in violation of 21

U.S.C. § 841(a)(1). Count V charged Mathis with travelling in interstate commerce to promote an unlawful activity involving the distribution of a controlled sustance, in violation of 18 U.S.C. § 1952(a)(3).

A jury trial was held before the Honorable Santiago E. Campos, United States District Judge, in Santa Fe, New Mexico, on December 15, 16, 17, and 18, 1980. The jury acquitted on four of the Counts, but returned a verdict of guilty as to Count III on December 18, 1980. Petitioner Mathis was sentenced to serve a term of four years, with a special parole term of four years, which sentence was imposed on February 13, 1981.

The sentences were appealed to the Tenth Circuit Court of Appeals; Notice of Appeal was filed on February 18, 1981. The Tenth Circuit Court of Appeals affirmed the conviction on February 8, 1982, and denied Peti-

tioner's Motion for Rehearing on March 2, 1982.

Facts

On August 23, 1980, Mathis travelled to New Mexico with Tim Cassias, an undercover informant for the Drug Enforcement Administration. Cassias had set up a cocaine transaction with persons who were, unknown to Mathis, DEA agents.

When they arrived in Albuquerque, Mathis dropped Cassias off and subsequently obtained about nine ounces of cocaine which he buried. From this portion, he took a quarter-ounce sample which was delivered to the government agents at approximately 1:00 p.m. Mathis put a second portion of the original nine ounces, about nine and three-quarter grams, in his boot, and a small amount in his wallet. He intended to divide this cocaine with Cassias

as their share of the transaction. The remaining eight and one-half ounces of cocaine were delivered by Mathis to DEA agents at about 5:00 p.m. The sample given, the portion retained, and the large portion buried and later delivered at 5:00 p.m. were all part of the same original quantity of cocaine.

Mathis asserted that he was entrapped into participating in the cocaine transaction by Tim Cassias. Ample evidence tended to support the entrapment defense, and the jury acquitted on all but one of the three possessions.

Mathis filed several pre-trial motions including, a Motion for a Bill of Particulars in which he requested that the government state the quantities of cocaine involved in each of the first four counts, and whether the cocaine referred to in Counts I and II

came from the same source as the cocaine in Counts III and IV.

Mathis asserted in his pre-trial Motion to Compel Election, Merger, and Consolidation that the activities in Counts I through IV were actually one transaction. The government claimed that the events described two separate transactions and that the cocaine possessed in Count III was the cocaine delivered in Count IV.

The jury found Mathis not guilty of Counts I, II, IV, and V, but found Mathis guilty of Count III. The trial court asked for briefs on whether the apparently-inconsistent verdict could stand. In its memorandum, the government admitted that the jury had found Mathis guilty of Count III because of the cocaine found in his boot. However, no evidence of the cocaine found in Mathis's boot was presented to the grand jury

that returned his indictment, nor was any separate charge based on the cocaine in the boot.

Reasons for Plenary Consideration

Because the trial court misconstrued the Federal Rules of Criminal Procedure and the Tenth Circuit Court of Appeals misconstrued the cases upon which it relied for its affirmance; because the Court of Appeals did not adequately discuss the issues of Fifth and Sixth Amendment violations; and because these Constitutional rights are fundamental ones and the Federal Rules of Criminal Procedure are fundamental guidelines which need to be construed narrowly and carefully, the Petitioner believes that the questions presented are so substantial as to require plenary consideration.

BASIS FOR FEDERAL JURISDICTION

This case was properly brought in federal court pursuant to 18 U.S.C. §3231. Petitioner was charged with violations of 21 U.S.C. §§ 841(a)(1) and 1952(a)(3).

ARGUMENT

Sufficiency of the Indictment

Mathis was indicted on two counts of possession and two counts of distribution. Because the indictment was vague and unclear and the counts seemed to contradict the facts, Mathis asked for a Bill of Particulars, requesting that the government specify the particular units of cocaine covered by the individual counts. This rather simple request was denied, and Mathis

consequently went to trial not knowing exactly what he was charged with or how to defend against it.

The evidence adduced at trial established that Mathis had committed either one possessory offense or three. The indictment charged two. Not only did this prevent Mathis from preparing intelligently for his defense, but also it confused the jury. Either Mathis was convicted in Count III of the same charge the jury acquitted him on in Count I, or the jury convicted him of a crime which was never presented to the grand jury. In short, the indictment fails to meet the minimum requirements established by the Supreme Court of the United States and the Federal Rules of Criminal Procedure.

Rule 7(c)(1), Federal Rules of Criminal Procedure requires specificity in allegations. As early as 1987, the United States

Supreme Court has recognized that "the indictment . . . must descend to particulars." United States v. Cruikshank, 92 U.S. 542, 558 (1975). See also, United States v. Hess, 124 U.S. 483, 486 (1888)("all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment wil be defective.")

The test for sufficiency of an indictment was set forth in Russell v. United States, 369 U.S. 749 (1962), in which two criteria were proposed: (1) whether the indictment contained the elements of the offense intended to be charged and sufficiently apprised the defendant of what he must be prepared to meet; and (2) in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquital or conviction. The Court

noted that an indictment must do more than simply track the elements of a criminal state when facts, as opposed to law, are at issue. 369 U.S. at 764.

The reasons for requiring that the counts in an indictment be free from all ambiguity are several. First, the Fifth and Sixth Amendment guarantees safeguard a defendant's right to be informed of the charges against him. Proper safeguards must be taken in preparing the indictment against the defendant in order "to avoid his conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him." United States v. Radetsky, 535 F.2d 556, 562 (10th Cir. 1976)(emphasis added). Furthermore, specificity in indictments is required in order to inform the court of the offenses actually charged in order that the court can later decide if the facts are

sufficient to support a conviction. Id.

The present indictment is defective in that it failed adequately to advise Mathis, the court, or the jury of the actual charges against Mathis. Evidence was adduced at trial which tended to establish that Mathis obained a little more than nine ounces of cocaine which he separated as follows: (1) the one-quarter ounce sample was delivered at approximately 1:00 p.m.; (2) eight and three-quarter ounces of cocaine was delivered at 5:00 p.m. the same day; and, (3) nine to ten grams of cocaine was found in Mathis's boot and wallet at the time of his arrest.

Two counts of possession with intent to distribute were charged in the indictment, but there was only one continuing possessory act. Consequently, neither Mathis, the court, nor the jury was able to tell from the indictment exactly which of Mathis's activi-

ties were alleged crimes for which he was prosecuted. The failure of the government to provide this essential information, even when requested, resulted in the violation of Mathis's Constitutional rights.

The Ninth Circuit has recently ruled on the issue of whether or not a defendant may be convicted of an offense which is different from that specifically charged by a grand jury. In United States v. Stewart Clinical Laboratory, Inc., 652 F.2d 804 (9th Cir. 1981), the Ninth Circuit stated:

> [i]n federal court a defendant may not be convicted of an offense different from that specifically charged by the grand jury. [Citations omitted.] The court may not amend the indictment by changing the offense charged to conform with the proof adduced at trial. [Citations omitted.]

Id. at 807.

The indictment against him in the

present case is defective because as the government candidly admits, no evidence was presented to the grand jury on the ten grams found on Mathis's person.

Multiplicity and Duplicity

The injustices which can arise as the result of violations of Constitutional rights are exemplified by Mathis's situation. Mathis obtained a quantity of cocaine to sell. Although there was only a single possessory act involved, the indictment charged him with two possessory acts, and the government refused to clarify the charges. The result is that Mathis was charged twice for the same act; the additional injustice is that the jury acquitted him of one of the possessory charges but convicted him on the other one. Thus, Mathis was both acquitted and convicted of the same act.

Although the Fifth Amendment prohibits placing a person in double jeopardy by charging him more than once for the same act, the government indicated that, because Mathis retained a portion of cocaine on his person, the government could charge him for an additional possessory crime. A logical extension of such charges would mean that the government could, at its whim, charge a person with separate counts of possession for each individual packet involved or for each day in which the possession occurs. Or it would mean that a person who obtained, for example, ten ounces of a drug and then distributed it in ten one-ounce portions would be indictable on ten counts of distribution and ten counts of possession, e.g., possession of ten ounces, possession of nine ounces, possession of eight ounces, and so forth. Such an absurd result is justifiable only by ignoring the

continuing nature of the possession offense.

It has long been recognized that there can be only one prosecution for a continuing crime (In Re Nielsen, 131 U.S. 176, 186 (1889)), and a single identical offense cannot be divided into more offenses with the possibility of cumulative punishments. United States v. Upthegrove, 594 F.2d 682 (6th Cir. 1974).

From the time Mathis obtained the cocaine, it was within his control. The act of possession and control occurred over the period of only a few hours--a single and continuing act. Both Count I and Count III charged Mathis with this act; the jury acquitted him of Count I, and there is absolutely no way in which to justify a conviction in Count III for the identical act.

If, for any reason, Mathis's possession of cocaine is not treated as a single con-

tinuing act, the government's indictment still fails to satisfy basic Constitutional requirements. If possession can be charged anew after each distribution, then Mathis should have been indicted on three, not two, counts: possession of the whole amount, possession of the whole amount minus the sample, and possession of the whole amount minus the sample minus the large sale amount. Instead, Mathis was charged with two counts and was unable to convince the government to specify which two possessory acts the indictment covered; one of the three possessions was omitted from the indictment. The question is, "which one?"

In fact, the indictment did not cover the third possession--the amount which was discovered on Mathis's person at the time of arrest--because the grand jury was unaware of it! The government presented no evidence

concerning this cocaine to the grand jury. Thus, the charges handed down by the grand jury, and upon which Mathis stood trial, had nothing to do with the cocaine found on Mathis's person. The government conceeded that this particular quantity of cocaine was not the cocaine which Mathis was charged with distributing in Count IV.

However, the jury itself had no way of knowing that the cocaine found on Mathis was not the subject of any of the counts. Consequently, a very real possibility exists that Mathis was convicted of a crime with which he was never charged. A more flagrant violation of the Constitutional right to be informed of the charges against one can be imagined only with difficulty.

Proper safeguards would not have required much effort from the government which could have, if it wanted to, charged Mathis

with the possession of the small amount of cocaine now in dispute. The government also could have supplemented its faulty indictment by supplying Mathis with the Bill of Particulars which he requested. Instead, the government took advantage of its self-created confusion and inconsistencies, at some times in the proceedings claiming that Count III concerned the cocaine found on Mathis's person, and at other times claiming tht Count III concerned the cocaine distributed as alleged in Count Iv. Obviously, Count III could not cover both. Nothing contained in the indictment or in the Bill of Particulars, nor any evidence adduced at trial, could protect Mathis against another charge of possession with intent to distribute cocaine, as one of the acts of possession has yet to become the subject of an indictment.

Multiplicity occurs when an indictment

charges a single offense in several counts; duplicity occurs when an indictment joins two or more distinct and separate offenses in a single count. United States v. Robinson, 651 F.2d 1188, 1194 (6th Cir. 1981). Both such indictments are invalid as violative of the Sixth Amendment right of a defendant to be informed of the nature of the accusation against him.

Mathis contends that either multiplicity or duplicity occurred in the instant case, for, if possession is a single continuing act, Mathis should have been charged with only one count of possession; but, if possession is not a single continuing act, each identifiable act of possession must be charged in a separate count.

A duplicitious indictment fails to inform a defendant whether he will be confronted with evidence of all or only some of

the offenses charged, and which charges he must be prepared to meet. United States v. Murray, 618 F.2d 892, 896 (2nd Cir. 1980); United States v. UCO Oil Co., 546 F.2d 833, 935 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); United States v. Zeidman, 540 F.2d 314, 316 (7th Cir. 1976); United States v. Tanner, 471 F.2d 128 , 139 (7th Cir. 1972), cert. denied, 409 U.S. 949 (1972); United States v. Kearney, 451 F.Supp. 33, 35 (S.D.N.Y. 1978). Also a conviction resulting from a duplicitious indictment violates the Fifth Amendment protection against double jeopardy. Duplicity in an indictment can also result in a pre-judicial overlap of evidence admissible as to one offfense but not as to the other.

Also, "'[t]he vice of duplicity is that a jury may find a defendant guilty on the count without having reached a unanimous

verdict on the commission of any particular offense.'" Robinson, 651 F.2d at 1194, quoting United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). This vice is exemplified in the present case, for if, as the government contends, Count III included two separate possessions, one which was never even presented to the grand jury, this could mean that the conviction on Count III was the result of a jury having decided that Mathis possessed only the cocaine found on his person. It could also mean that part of the jury believed Mathis possessed one quantity of cocaine and the other part of the jury disbelieved this but did believe that he possessed the other quantity of cocaine; in other words, it would have been possible to convict Mathis without the jury having reached a unanimous verdict.

Multiplicity in indictments also violates the Fifth and Sixth Amendments and in addition increases the risk that a jury will be prejudiced by the weight of the repetitious allegations. United States v. Montilla Ambrosiani, 610 F.2d 65, 70 (1st Cir. 1979); United States v. Carter, 576 F.2d 1061, 1065 (3rd Cir. 1978); United States v. Hearod, 499 F.2d 1003, 1005 (5th Cir. 1974).

The Sixth Circuit, on at least two occasions, has dealt with the issue of multicity in indictments in controlled substanstances cases. In United States v. Reed, 647 F.2d 678 (6th Cir. 1981), the court rejected the "same facts test" outlined in Blockburger v. United States, 284 U.S. 299 (1932), stating that such a test "does not apply to multiple counts under a single statutory provision where the offense involves a course of criminal conduct." Reed, 647 F.2d at 68i.

The court in Reed also discusssed Bell v. United States, 349 U.S. 81 (1955), in which the Supreme Court held that an individual transporting two women across state lines for immoral purposes could be found guilty of ony one single act of transportation. Reed, 647 F.2d at 682. In Bell, the United States Supreme Court stated:

> When Congress has the will it has no difficulty in expressing it--when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing will, the ambiguity should be resolved in favor of lenity . . . . [I]f Congress does not fix the punishment for a criminal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . .

Bell, supra, 349 U.S. at 83-84.

The defendants in Reed were charged in three counts with receiving and concealing goods stolen at different times and places. The court held that, regardless of where the property came from or how the defendants obtained it, the proof tended to show a single course of illegal conduct. Reed, 647 F.2d at 685.

In United States v. Woods, 568 F.2d 509 (6th Cir. 1978), reh. denied, the Sixth Circuit considered a fact situation similar to the one in the case at bar. The Defendant Woods was charged with and convicted of several counts of narcotics law violations. At the time of Woods's arrest, several caches of heroin were found in his automobile and on his person. It appears from the facts that at least one quantity of heroin was not the subject matter of any of the counts and that two quantities of heroin found in the trunk

were, together, the subject of a single count. The Sixth Circuit had much trouble with the indictment and ended up remanding part of the case to the district court with instructions to vacate the convictions of the two counts just described. The language in Woods is very useful and quite a propos to our case.

Although generally trial evidence does not need to establish the precise amount of heroin alleged in an indictment, the general rule is inapplicable when different quantities of drugs are the subject of different counts.

> The difficulty of identifying the specific heroin with one of several counts against the same defendant without incorporating into the language of the count any more specific identifying information is apparent. Proof that the defendant possessed any one of the five parcels of heroin seized would suffice

to sustain a conviction under any of the three counts.

Wood, 568 F.2d at 512.

The court in Wood asks several questions. Similar questions could be asked of the case at bar; e.g., was the cocaine described in Count III that which was transferred by Mathis or that which was recovered from his person, or both? What would happen if the proofs at trial showed each separate quantity of cocaine to be identical in weight to the others? What would be the result should it have been determined, for example, that the cocaine found on Mathis's person had been seized in violation of his Fouth Amendment rights, thus making it inadmissible? Which of the counts would then be affected? Conversely, what would have been the results had Count III never been returned by the grand jury and the case had gone to trial solely on Count I? If Mathis were shown, in

fact, to have possessed several quantities of cocaine, would it have all been admissible as proof of his possession under Count I? Would not the government's proof that Mathis was in possession of any of the quantities of cocaine have been sufficient to support his conviction under Count I, variance in the weights being immaterial? If so, how then could Mathis have been charged with several separate but simultaneous acts of possession? See Woods, 568 F.2d at 512.

The Sixth Circuit, unable to find any authority bearing directly upon multiplicity as applied to possession of controlled substances with intent to distribute, found guidance in United States v. Jones, 533 F.2d 1387 (6th Cir. 1976), cert. denied, 431 U.S. 964 (1977). In Jones, the judge relied heavily upon an old English case in which Lord Mansfield held that a baker could be

lawfully convicted only once of a violation of a statute which prohibited the practice of trade on Sunday, even though the baker might have baked several loaves of bread on one day or might have worked several hours on that Sunday. The court in Jones noted that "[p]ossession is a course of conduct, not an act; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm." Jones, 533 F.2d at 1391.

The Sixth Circuit in Woods decided that, "as long as the statute does not graduate the gravity of possession of heroin by the quantity possessed, we see no indication that Congress intended to permit a multiplication of the offenses of possession at any given time by a defendant upon evidence that the heroin may merely have been separately pack-

aged or stashed." United States v. Woods, 568 F.2d at 513.

Because there was ample leeway in the sentencing for a single conviction to take into account the overall amount of drugs involved, and because the government might have been able under one count or any of the several counts to have obtained a conviction by proof of possession, thus insuring that the government's dragnet against dope peddlers is comprehensive and effective, the Sixth Circuit required a vacation of the convictions.

It is clear, in the jurisdictions in which the issue of possession of illegal substances has arisen, that the government must be careful in clarifying its indictments in cases in which more than one quantity of illegal substance is concerned. The reasons behind this are well based in constitutional

law and do not place a heavy or unreasonable burden upon the government. Rather, they require only that the government provide proper information in the indictment instead of hedging its bets by reliance on imprecise and overbroad language.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Appendix

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs.	)	No. 81-1203
	)	
MARVIN LESLIE MATHIS, JR.,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
For the District of New Mexico
(D. C. No. Cr. 80-147)

APPENDIX A

James Blackmer, Assistant U. S. Attorney, Albuquerque, New Mexico (R. E. Thompson, United States Attorney, and Larry Gomez, Assistant United States Attorney, Albuquerque, New Mexico, with him on the brief), for Plaintiff-Appellee

Catherine Baker Stetson, D'Angelo, McCarty & Vigil, Albuquerque, New Mexico (Vince D'Angelo, D'Angelo, McCarty & Vigil, Albuquerque, New Mexico, with her on the brief), for Defendant-Appellant

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Before DOYLE, SEYMOUR and PECK*, Circuit Judges.

DOYLE, Circuit Judge

*Honorable John W. Peck, of the Sixth Circuit, sitting by designation.

Preliminary Statement

The case which we now review involves the possession and sale of drugs, namely cocaine. There is a little dispute in the facts.

The differences arise in connection with questions of law. Primarily, that the defendant claims prejudice from alleged failure of the government to describe with adequacy the various charges that were in the indictment. The contention is that it was confusing to the defendant as to what he was charged with because there were three different parcels of cocaine which where not identified according to quantity; there was a one-quarter ounce sample which was delivered to the purchaser, the police officer, as a sample at around one o'clock; the connected sale of eight and three-quarter ounces or half-pound was delivered at five o'clock the same day; and

nine to ten grams were found in defendant's boot and wallet when he was searched at the office of the Drug Enforcement Administration following his arrest incident to the sale of the one-half pound of cocaine.

The other problem is that the defendant was dealing with an old friend who had become a confidential informant for the Drug Enforcement Administration whereby he claims entrapment. The jury returned a verdict of guilty on the sale of the one-half-pound so the issue of entrapment is resolved.

This sale had its origin in August, 1980 when a secret drug enforcement agent named Tim Cassias was visiting the defendant in the latter's home in El Paso, Texas. During this visit defendant Mathis told Cassisas, according to the latter, that he had a friend named Joe in Albuquerque who wished to sell a half-pound of cocaine.

The Evidence at Trial

Following this conversation Cassias contacted a special agent of the Drug Enforcement Administration and advised him of the availability of this cocaine. The special agent instructed Cassias to inquire if the defendant and his friend would deliver the cocaine to Lubbock or El Paso, Texas. Cassias was advised by the defendant that the only place where cocaine would be delivered was Albuquerque and it was finally agreed that the delivery would be made there on August 23rd, 1980. Following this agreement defendant and Cassias proceeded to Albuquerque, New Mexico from El Paso, Texas in the automobile of Cassias. After arrival in Albuquerque, the defendant told Cassias he wanted to be dropped off at a special location so that he could meet with his connection and get a sample of the cocaine.

Cassias was told to be back in an hour and a half. Cassias proceeded to make contact with the investigating officers and to advise them as to the activity that defendant had undertaken.

After this meeting with the officers, Cassias went to the location where he had dropped off the defendant and there met him. He was told by the defendant that he, Mathis, had seen the cocaine but had not picked up the sample. He was further informed that he would have to go up the Tijeris canyon, which was close by, to obtain it. Susequently, the two men went up the canyon and made contact with a man in a white car, who proved to be the source. This car followed defendant and Cassias to the Tijeris post office. There defendant got out of the automobile and got into the white car, but before doing this the defendant advised Cassias to find something

to do for approximately thirty minutes. After defendant left in the white car, Cassias called the investigative officers and explained what was transpiring.

A short time later the defendant returned to the post office in Tijeris Canyon and there advised Cassias that he had obtained the sample of cocaine. The two men then proceeded back to Albuquerque with the sample.

During the trip defendant and Cassias discussed the delivery of the cocaine and its quality. When they arrived in Albuquerque, they stopped at the Rodeway Inn Lounge where Cassias contacted his associates, the supposed buyers. Cassias went into the lounge and gave the sample to Detective Don Smith of the Albuquerque Police Department. Smith was told that defendant and his friends wanted to be paid prior to delivery, Smith replied that

the transaction would have to be a mutual exchange. Cassias went out of the lounge and advised defendant of this. After that, the defendant and Cassias came back into the lounge and the defendant was introduced to Detective Smith. They talked about the price which was to be paid for the sample and the method of delivering the cocaine and finally reached agreement. The sale of the half-pound was to be effected by the defendant taking Cassias' automobile up the canyon and placing the cocaine in the automobile and then leaving the area. The agents were to come shortly thereafter and put the money in the automobile, pick up the cocaine and go their separate ways.

In accordance with the agreement, Detective Smith and Cassias went up the canyon and found the defendant near Cassias' automobile. They then talked about the cocaine and short-

ly thereafter defendant obtained the cocaine from a hiding place and delivered one-half-pound to the agents. Following the delivery defendant was arrested and taken to the Albuquerque Drug Enforcement Administration office to be fingerprinted. During the processing Detective Hearn searched the defendant and found relatively small amounts of cocaine in his boot and wallet (approximately 9 grams).

The main defense of Mathis was that he had been trapped into participating in the cocaine transaction by the confidential informant, Tim Cassias, his former friend.

Trial was to a jury and defendant, although convicted on Count III of the indictment, was found not guilty on the four other counts in the indictment.

Counts I and II describe the earlier transaction, the transfer of the sample,

which had occurred at about 1:00 p.m. on August 23rd. Count III, the one on which conviction was had, described the transaction at 5:00 p.m. which had to do with possession with intent to distribute the half-pound of cocaine alleged to have been purchased on that day at 5:00 p.m., just prior to the arrest. The time of the incidents were in the indictments, whereas the amounts were not set forth. Based on the time alleged (about 1:00 p.m.) Counts I and II, which refer to possession with intent to distribute a quantity of cocaine, necessarily had to do with the sample which was transferred to Officer Smith. It appears that the important transaction in the case was Count III which alleged the possession with intent to distribute the one-half-pound of cocaine in exchange for $16,000 at approximately 5:00 p.m.

Count IV, which alleged distribution, is also timed at 5:00 p.m.

There was a pre-trial motion by the defendant to compel election, merger and consolidation. In the motion it was stated by Mathis that Counts I, II, III and IV were actually a single transaction. The government's statement was that "in response to pararaph 3 of defendant's motion, the plaintiff would state that the events described in Counts I and II and those in Counts III and IV invovled two separate deliveres of a quantity of cocaine, Schedule II narcotic drug control substance, to undercover law enforcement officers." Prior to trial the government asserted that the cocaine involved in Count III was the same as that described in Count IV. In the government's brief, counsel say that "the thrust of defendant's argument is aimed at the quantity of cocaine involved

in Count III." Mathis delivered approximately one-half-pound of cocaine to the government agents.

Following his arrest and arrival at Drug Enforcement Administration headquarters (DEA) the search of defendant uncovered nine more grams of cocaine concealed on Mathis' person.

The writer of the brief fails to take notice of the fact that Counts III and IV charged that at approximately 5:00 o'clock the incident occurred. Five o'clock was when the sale was made to the agents by Mathis of one-half-pound of cocaine in exchange for $16,000. The nine grams of cocaine in Mathis' billfold and in his boot had been placed there earlier and were not part of the half-pound sale. This cocaine was discovered

after the sale, in the office of DEA.[1]

As we view the case as a whole the all important act consisted of the sale of the one-half-pound of the cocaine at 5:00 p.m. The preliminary activities were antecedent to this sale and this not only should be but is the essence of Count III. Indeed there is an inescapable impediment to including the boot and billfold cocaine in Count III. We refer to the fact that the evidence as to this was not presented to the Grand Jury. Also, the search occurred at another place and at another time. In addition there was not a transfer which evidenced intent to distribute in connection with the amounts which Mathis

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1. One gram was found in the Mathis billfold and eight or nine grams were discovered in his boot when the drug officers searched him after they arrested him.

had secreted on his person. The intent to distribute was shown when the half-pound of cocaine was sold to the agents.

The position which this court must take, in view of the circumstances, is that the case must stand or fall on the possesion and sale of the one-half-pound of the cocaine. We do not say that the sale of the sample and the possession of the remaining amount found on the person of defendant were independent transactions. On the contrary each is a part of the sale of the half-pound. It is unquestionably one criminal enterprise.

The questions to be considered are:

1. Sufficiency of the allegations in the indictment.
   a. Does it notify the defendant of the contents of the charge - including the subject matter?

2. Did the subject matter constitute cocaine which was found on the person of the accused or the one-half-pound which was purportedly sold to the drug agents for $16,000?

3. Was the cocaine which was found on defendant's person admissible in evidence even though it is not part of Count III and could not be?

I.

Count II in its entirety reads as follows:

COUNT III

On or about the 23rd day of August, 1980, at approximately 5:00 p.m., in the State and District of New Mexico, the defendant, MARVIN LESLIE MATHIS, JR., unlawfully, knowingly and intentionally did possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance.

In violation of 21 U.S.A. 841(a)(1).

Counts I and II are drafted similarly to Count III. The only difference is that the time is not the same. Count III alleged that on the 23rd day of August at approximately 5:00 p.m. and then proceeds to describe the offense. Count I and II differ in that the time in each of those is 1:00 p.m. Count III, the sale of the one-half-pound of cocaine, is the nucleus of the entire transaction. Count I and II purport to describe

the 1:00 o'clock occurrence and the only activity at that time was the transfer of the sample which had been furnished by Mathis and which was turned over to Officer Smith. It was contemplated the sum of $500 should be paid for that but, as it happened, the arrest occurred before the $500 could be turned over.

The reasons that Count III plainly pertains to the half-pound sale is not only because it occurred at the time it did but because it was the central happening which justified Count III, but also it was at that very time that Mathis, Officer Smith and Cassias had gone up to the canyon for the purpose of getting the cocaine and completing the transaction. Previously Mathis and Cassias had delivered the sample in Albuquerque. After Mathis had received the entire amount, including the sample and that which

was in his boot and his billfold as well, he had stashed it near the post office and had taken the small amount, which was the sample, to Smith in company with Cassias.

The sale of the half-pound of cocaine was the culmination of all of the prior happenings, the journey from El Paso, the contact with the seller and buyers, the obtaining of the cocaine and the attempted transfer to Officer Smith in exchange for the $16,000 purchase price. It was this quantity that brought the parties together in the canyon for the pupose of completing the sale. In other words, the sale climaxed all of the discussions and all the other activity. When it was completed, the entire case was completed and so it was not difficult for the defendant to comprehend and it is scarcely surprising that the jury found the defendant guilty on that charge and not guilty on the

othes, the satelite charges which were improperly brougnt in the first place. The evidence is clear then that the sale of the half-pound was the charge contained in Count III. It was not only possession, it was a sale which proved the alleged intent to distribute. The sale of the sample previously at 1:00 o'clock, which is described in Counts I and II, cannot be said to have been completed in the same way because payment was not made. So Count III, which described possession with an intent to distribute at 5:00 p.m., describes to the extent necessary the half-pound transaction and that only.

We do not say that it is the best indictment that was ever drawn. It could and should have been more explicit. It ought to have been limited to the cocaine which was sold and described in Count III. That would have caused it to be conclusive.

Not only is the third count the important one, indeed it is the only one, if the transaction constitutes a single interrelated criminal enterprise. It does and and is different from the type of case in which there are several independent acts.

The Supreme Court in Blockburger v. United States, 284 U.S. 300, made this distinction extremely well. The indictment in that case specifically described several different acts. The convictions based upon the indictment which had separately charged the various sales of drugs was upheld. The Supreme Court said in that case:

> the statute is not aimed at sales of the forbidden drugs qua sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. * * *

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses, or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342.[2]
>
> Id. 304

The Sixth Circuit considered this general problem in United States v. Reed, 647 F.2d 678 (1981). There the offense was held to have been a continuing course of illegal conduct, receiving and concealing stolen

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2. At p. 302 the author quotes Wharton's Criminal Law, 11th Ed., Sec. 34:

> The test is whether the individual acts are prohibited, or the course of actions which they constitute. If the former, then each act is punishable separately * * *. If the latter, there can be but one penalty.

goods. It was ruled that the two offenses involved should have been merged and that only one sentence could have been imposed; the consecutive sentences which had been ordered against each defendant on Counts I and II had to be vacated. It is noted in the opinion that the statute was ambiguous as the appropriate unit of prosecution. The court pointed out that the important test was whether there existed a single course of criminal conduct and then whether there was a different element in each count as there was in Blockburger.

United States v. Reed cites Bell v. United States, 349 U.S. 81 (1955), wherein the Supreme Court reversed the decision of the Sixth Circuit and held that an individual transporting two women across state lines for immoral purposes could be found guilty of only one single act of transportation in

violation of the Mann Act. In so ruling the court examined the statutory language in its entirety, and articulated the following rule of statutory construction which guides us here:

> When Congress has the will it has no difficulty in expressing it-when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particulary, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity * * *. [I]f Congress does not fix the punishment for a criminal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.

In Castle v. United States, 368 U.S. 13, (196L) the petitioner had been convicted on five separate counts of violating 18 U.S.C. § 2314, which statute prohibiits the interstate transportation of forged or altered securi-

ties. The petitioner transported five forged money orders across state lines at the same time. Relying upon Bell and the rule of lenity for construing ambiguous statutes, the Court found that petitioner could be convicted of only one offense even though he had transported the five separate forged securities.

The Sixth Circuit, in United States v. Wood, 568 F.2d 509 (6th Cir. 1978), rendered a decision in a narcotics case which is quite similar to this case. It involved heroin which had been divied into several packages. The charge was possession with intent to distribute. Count I alleged that there had been possession of 111.36 grams of heroin in violation of 21 U.S.C. § 841(a)(1).

Count II charged that Woods, Schnell and Snyder unlawfully distributed and aided and abetted each other in the distribution of

111.36 grams of heroin, in violation of 21 U.S.C. § 841(a)(1). Counts III and IV charged unlawful possession with intent to distribute 115.37 grams of heroin in Count III and 95.34 grams of heroin in Count IV. The 111.36 grams of heroin, described in Count I of the indictment, was sold by Schnell, a confederate of Woods, to the undercover government agents and was thus the same heroin described in Count II. The heroin described in Count III of the indictment corresponded in weight to the two parcels found in the front seat of the car weighing 114.55 grams and 107.26 grams, respectively. There were two caches of heroin discovered in the trunk of the Opel car which weighed 28.527 and 54.97 grams, respectively, or a total of approximately 86 grams, which approximated the weight of the heroin decribed in Count IV. Woods was con-

victed of all four counts and sentenced to seven years plus a special parole term of three years on each of the four counts, the sentences to run concurrently. As in the case at bar, Woods moved the court to compel prosecution to elect between Counts I and II.

On appeal Woods contended that there was error in denying his motion. The Sixth Circuit observed that the statute did not graduate the gravity of the crime of possession of heroin based on the quantity possessed and thus it saw no indication that Congress intended to permit a multiplication of the offenses of possession at any given time by defendant upon evidence of the quantity of the heroin, they merely may have been separately packaged or stashed. The reasoning of the Woods decision was that the quantity was of no consequence. It was the

question of possession that mattered and that the additional amounts which were separately packaged were admissible for the purpose of proving the possession and for that purpose only.

The convictions of Counts I and II and the sentence for Count II was affirmed. The case was remanded to the district court with instructions to vacate the sentence under Count I and the convictions and sentences under Counts III and IV.

The Woods case and our case are similar in that both deal with a single course of criminal conduct and an effort to compound sentences. Thus, if here there had been convictions on Counts I and II and III and IV, some of those repetitious convictions would not have to be vacated due to the failure of the trial court to recognize that this was one criminal transaction which could

not be treated as several distinct criminal transactions.

But in our case the multiplicity of counts problem has been remedied by the jury. It determined that Counts I, II, III and IV should be nullified. They found the defendant not guilty of these and thus, the jury, in effect at least, treated it as one transaction. It found the defendant guilty under Count III, which was the core of the case. In our judgment, then, and in accordance with the reasoning in United States v. Woods and United States v. Reed, supra, we conclude that the conviction in Count III charging possession with intent to distribute fully identified the transaction and is entitled to stand. The evidence fully supports it and the cocaine described in Counts I and II as well as in Count IV were part and

parcel of the single transaction, which was contained in Count III.

II.

The final point concerns the legal consequences which flow from the cocaine which was present on the defendant's person, amounting to roughly 9 grams. At trial the government's theory of the case was as we have stated it, that is the defendant was guilty of violating the allegations set forth in Count III. Thus, they recognized that this was the crux of the case. However, following the conviction, the trial court asked for briefs on the cocaine found in the search. The government argued that the cocaine which was found on the defendant's person after his arrest and after he was taken to headquarters, was actually the cocaine that was set forth in Count III. Thus, they shifted their

position. This was a gross mistake because the cocaine which was found on defendant's person was never described to the Grand Jury. Moreover, no allegation in the indictment purported to charge this possession. However, under the theory that we have outlined above, that of a single continuous criminal enterprise, it was unnecessary for the government to indulge in such an expedient action as this. This was after the case had been argued to the jury and the verdicts had come in. In any event this court is not bound by this action which was taken by the govnerment. That this was one continuous criminal enterprise is apparent from the fact that it was planned in El Paso, Texas, and the defendant journeyed to Albuquerque, New Mexico for the purpose of obtaining from the defendant's source a quantity of cocaine to sell. This was one single criminal transac-

tion and thus, the charges other than Count III were surplusage. All the government needed to do was to allege the possession with intent to distribute as is set forth in Count III. True, it should have detailed the transaction to a greater extent. Defendant not only argued that the cocaine which was discovered on his person could not be the basis for Count III, he also contended that it could not qualify as a charged offense since it was not presented to the Grand Jury. As we view the case, the three quantities are in no way separate but are tied together as parts of one enterprise.

The quantities found in the search were not charged in the indictment. Therefore, it was not necessary that there be a presentation to the Grand Jury of this part of the whole. It was not a separate nor a similar offense and it was cogent evidence to prove

the possession requirement in Count III. It also was relevant in that it showed that the defendant was not as innocent as he contended in seeking to establish an entrapment theory.

In United Staes v. Woods, supra, the Sixth Circuit ruled that division of the drug into several packages did not form a basis for treating each package as a separate crime since quantity does not increase the gravity of the crime. The court said:

> However, as long as the statute does not graduate the gravity of the crime of possession of heroin by the quantity possessed, we see no indication that Congress intended to permit a multiplication of the offenses of possession at any given time by a defendant upon evidence that the heroin may merely have been separately packaged or stashed.

In any event the defendant did not make an objection to the admission of this search evidence and it is not of such great moment

in any event to justify invoking the doctrine of plain error. In the face of all of the cocaine that the defendant was dealing in, the presence of some retained on his person could not cause prejudice and does not justify use of either the similar other offense doctrine nor does it justify condemnation because it was not presented to the Grand Jury. Finally, the jury acted very wisely in this matter; it treated it as one continuing criminal enterprise and its disposition of Counts I, II, IV and V was entirely proper.

The judgment of the district court is affirmed.

DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA vs.

DEFENDANT [MARVIN LESLIE MATHIS, JR.

Docket No. 80-147

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date --------February 13, 1981

COUNSEL [Vince D'Angelo Retained

With Counsel

PLEA [NOT GUILTY

[There being a verdict of GUILTY

FINDING & JUDGMENT	[Defendant has been convicted as charged of the offenses of Possession with Intent to Distribute Cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1), as charged in Count III of Indictment filed September 9, 1980.
SENTENCE OR PROBATION ORDER	[The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS IT IF FURTHER ORDERED that a special parole term of four (4) years be imposed.

SPECIAL CONDITIONS OF PROBATION	
ADDITIONAL CONDITIONS OF PROBATION	[In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period of within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.
COMMITMENT RECOMMEN- DATION	The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY /s/
SANTIAGO E. CAMPOS
U.S. District Judge

Date 2/13/81

MARCH TERM - March 2, 1982

Before Honorable William E. Doyle, Honorable Stephanie K. Seymour and Honorable John W. Peck*, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 81-1203
MARVINE LESLIE MATHIS, JR., Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/
HOWARD K. PHILLIPS, Clerk

*Of the Sixth Circuit Court of Appeals, sitting by designation.

APPENDIX C